UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
MERCHANT MARINER'S DOCUMENT
Issued to: Arnold J. DUPRE, JR. 434-64-7295

DECISION OF THE VICE COMMANDANT ON APPEAL
UNITED STATES COAST GUARD

2478

Arnold J. DUPRE, JR.

This appeal has been taken in accordance with 46 U.S.C. SS7702 and 46 CFR SS5.701.

By his order dated 30 September 1987, an Administrative Law Judge of the United States Coast Guard at Houston, Texas, suspended Appellant's Merchant Mariner's license and document for a period of one month upon finding proved the charges of negligence, misconduct, and violation of law. The specification supporting the charge of negligence alleged that Appellant, while serving under the authority of his above-captioned license and document, aboard the towing vessel ADMIRAL LEE, did, on 15 February 1987, tow the unmanned freight barge CMS-754 in an unsafe and hazardous manner, to wit: operating with a load in excess of the vessel's stability letter The specification supporting the charge of misconduct alleged that Appellant, acting under the authority of his license and document aboard the ADMIRAL LEE, on 15 February 1987, failed to insure that the CMS-754 was loaded in compliance with the vessel's stability letter issued by the U.S. Coast Guard. The specification supporting the charge of violation of law alleged that Appellant, under the authority of his license and document, violated 46 U.S.C. SS2302, however, the Coast Guard withdrew this charge and its specification at the commencement of the hearing. The hearing was held at Houston, Texas on 5 August 1987. The Appellant was represented by professional counsel and entered an answer of denial to the charges and specifications. The Investigating Officer introduced a total of ten exhibits which were admitted into evidence by the Administrative Law Judge. The Investigating Officer called three witnesses who testified under oath. The Appellant introduced four exhibits which were admitted into evidence. He also testified under oath in his own behalf. The Administrative Law Judge concluded that the three remaining charges and the respective

specifications had been proved. The complete Decision and Order was executed on 30 September 1987 and served on Appellant on 2 October 1987. Notice of Appeal was timely field on 26 October 1987 and was perfected on 25 November 1987.

Appearance: William B. Gibbens III, Queen & Crescent Bldg., 344 Camp Street, Suite 900, New Orleans, LA 30130

FINDINGS OF FACT

Appellant was servig under the authority of his captioned license and document as an operator of uninspected towing vessels upon oceans not more than 200 miles offshore on board the towing vessel ADMIRAL LEE on 14 and 15 February 1987. The ADMIRAL LEE was towing the 180 foot, 1,047 gross ton freight barge CMS-754. The CMS-754 is certified for ocean service under a Coast Guard Certificate of Inspection. The barge was also operating under an Internal Loadline Certificate which incorporated a Coast Guard Stability Letter requiring that the maximum allowable center of vertical gravity of the cargo as stowed not exceed six feet above the main deck. The Certificate of Inspection required that the CMS-754 be loaded in accordance with the restrictions cited in the International Loadline Certificate.

On or about 13 February 1987, eighty-five containers were loaded aboard the CMS-754, each container 8.5 feet high x 8.5 feet wide x 40 feet long, and each approximately half loaded with pelletized rice. Many of the containers were stacked four high and were secured using 3/4" x 6" pins inserted into clips welded to the deck. The top containers were secured to adjacent containers using a device called a "bridge clip". On that same date, a surveyor for the National Cargo Bureau inspected the CMS-754 and refused to issue a "Securing Certificate" (as that surveyor termed it) because the surveyor determined that the cargo was not properly secured and the barge was overloaded. When it learned that the National Cargo Bureau surveyor refused to issue a "securing certificate", the operating company subsequently changed the barge's transit route from the Gulf of Mexico to an internal route utilizing the Gulf Intercoastal Waterway. North winds exceeding 20 knots were forecast for the transit. Appellant inquired with the operating company regarding the stowage and securing of the cargo and made a log entry to that effect on 15 February 1988. This entry is reflected in I.O. Exhibit 7 and Respondent Exhibit B.

The Appellant, operating the ADMIRAL LEE, towed the CMS-754 out of Freeport, Texas at approximately 1730 on 15 February 1988. The

ADMIRAL LEE towed the freight barge on a hawser. The towing vessel SIMBRA simultaneously pushed the CMS-754 on the barge's center stern. The Appellant was the lead operator and navigator of the three vessel flotilla. During the voyage, the SIMBRA's operator observed and reported to Appellant that the CMS-754's port quarter was down approximately four feet, with the main deck below water level. Appellant increased the speed to alleviate the list. At approximately 2330 on 15 February 1988, the CMS-754 rolled to starboard, then port, dumping twenty-five containers into the water at mile 376 of the Gulf Intracoastal Waterway. At the time of the incident the vertical center of gravity on the CMS-754 was ten to twelve feet above the main deck. The maximum vertical center of gravity permitted for the CMS-754's safe navigation is six feet above the main deck pursuant to the CMS-754's Loadline Certificate and Coast Guard Stability Letter 1643 of 13 June 1977. (I.O. Exhibits 3 and 4).

BASES OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge. Appellant's bases of appeal are:

(1) May a person be charged with violation o a law or regulation in the same action as a charge of negligence or misconduct, where the alleged violation of law is based on the same operative facts as negligence;

(2) Did the Administrative Law Judge err in finding misconduct where there was no evidence of a formally established rule;

(3) May a master be charged with violating a barge's stability letter on an inland tow, where the letter on its face applies only to ocean tows;

(4) May a master be charged with violating a barge's Certificate of Inspection on an inland tow, when the portion of the certificate allegedly violated applies on its face only to ocean tows;

(5) May a master rely upon the owner's responsibility to supply valid stability information.

OPINION

I

Appellant argues that the Government erred in charging him with a violation of law or regulation in the same action as a charge of

negligence or misconduct, where the alleged violation of law is based on the same operative facts as negligence or misconduct. Appellant's argument is without merit. In this case, the basis for the Suspension and Revocation Proceedingis not exclusively a violation of law or regulation. That is, there were other acts committed by the Appellant that precipitated the original initiation of charges by the Government. Title 46 C.F.R. 5.33, cited by the Appellant, is not intended to prohibit the initiation of charges for violation of law, misconduct, or negligence jointly or alternatively. Exigencies of proof often require the Government to draft charges in this manner. There is no statutory or regulatory requirement for exclusivity for charges for a violation of law. Suspension and Revocation Proceedings are intended to be remedial in nature and to help maintain standards for competence and conduct essential to the promotion of safety at sea. See 46 C.F.R. 5.5; Appeal Decision 2379 (DRUM), Appeal Decision 2346 (WILLIAMS). Accordingly, administrative pleadings in these proceedings are not stringently bound by the procedural pleading requirements governing civil and criminal judicial forums. Kuhn v. CAB, 183 F.2d 839 (D.C. Cir. 1950). The main requirement is that the Appellant fully "understood the issue" and "was afforded full opportunity" to justify his conduct. Citizens State Bank of Marshfield, MO v. FDIC, 752 F. 2d 209 (8th Cir. 1984); NLRB v. MacKay Radio & Telegraph Co., 304 U.S. 333, 58 S. Ct. 904, 82 L. Ed. 1381 (1938); Aloha Airlines v. CAB, 598 F. 2d 250 (D.C. Cir. 1979). Appellant's flawed interpretation of 46 C.F.R. 5.33, if adopted arguendo, would have the unreasonable result of requiring multiple hearings on facts relating to a single incident. Such a result would be contrary to the principle of judicial economy and would certainly be inconsonant with the long accepted principle of viewing Suspension and Revocation Proceedings as remedial in nature.

II

Appellant contends that the Administrative Law Judge erred in finding the charge of misconduct proved because there was no proof produced at the hearing that Appellant had violated a formally established rule as defined in 46 C.F.R. 5.27. I find no merit to this argument. Appellant was charged with misconduct in failing to ensure that the barge CMS-754 was loaded in accordance with that vessel's Stability Letter. A Stability Letter is required under the provisions of 46 C.F.R. 170.120 before the vessel can be put in service. That regulation also permits the Stability Letter to be included in the Loadline Certificate and/or the Certificate of Inspection. In this case, the Stability Letter is incorporated by

reference into the Loadline Certificate. (I.O. Exhibit 3). The requirement to be loaded in accordance with the Stability Letter is cited as a condition of operation on the CMS-754's Certificate of Inspection and clearly is printed on the face of the Certificate of Inspection as follows: "BARGE IS TO BE LOADED IN ACCORDANCE WITH THE RESTRICTIONS PLACED ON CURRENT LOADLINE CERTIFICATE." (I.O. Exhibit 2). Federal statute and regulation, respectively set forth in 46 U.S.C. 3313 and 46 C.F.R. 97.50-1(a), require that a vessel comply with the conditions of operation provided in the Certificate of Inspection at all times unless specifically granted an exemption. See, also, Appeal Decision 2392 (BUSINELLE), Appeal Decision 2110 (HARRIS), Appeal Decision 2136 (DILLON). The vessel operator is expected to know the requirements and status of the Certificate of Inspection for his vessel. Appeal Dcision 2308 (GRAY). The towing vessel operator is also expected to know the operating characteristics and limitations of his tow. The operator has an obligation to inspect the tow in order to insure a safe voyage. Collier v. 3-A's Towing Company, Inc., 652 F. Supp. 576 (S.D. AL. 1987), Kingfisher Marine Service Inc. v. The N.P. SUNBONNET, 724 F. 2d 1181 (5th Cir. 1984), Dillingham Tug & Barge Corp. v. Collier Carbon & Chemical Corp., 548 F. Supp 691 (N.D. CA. 1981), Tidewater Marine Activities, Inc. v. American Towing Co., 437 F. 2d 124 (5th Cir. 1970). An inspection of the Certificate of Inspection and stability requirements is essential to understanding the tow's characteristics and limitations. There is sufficient information on the record for the Administrative Law Judge to reasonably find that Appellant violated the Certificate of Inspection and consequently, the Stability Letter. The requirement to comply with the Certificate of Inspection, being a duly established statutory requirement, was clearly violated and consequently, the charge of misconduct was proved.

III

Appellant next urges that it was error to charge him with violating the vessel's Stability Letter on an inland voyage because the Stability Letter applies only to ocean voyages. This argument is without merit. The term "Oceans" that appears on the face of the Certificate of Inspection refers only to the route permitted. An "Oceans" route endorsement also permits the vessel to be used for inland navigation pursuant to 46 C.F.R. 90.05-7. Separate and apart from the authorized route ae the enumerated vessel's conditions of operation. Consequently, the stability restrictions were not suspended or exempted merely because the vessel was navigated inland rather than transiting on an ocean route. The Stability Letter was

not merely a prerequisite for the Loadline Certificate but was also issued pursuant to vessel inspection regulations set forth in 46 C.F.R. 93.07 (1977), (currently, 46 C.F.R. 170.120). The purpose of the Stability Letter is to insure the safe, prudent loading of the vessel and underway stability. It would be unreasonable and contrary to the principles of safety and good seamanship to construe the conditions of operation portion of the Certificate of Inspection to be operative only on the ocean per se where the "Oceans" endorsement specifically includes navigation on inland waters.

IV

Appellant claims that it is error to charge him with violating the provisions of the vessel's Certificate of Inspection when operating the vessel on inland waters because the provisions relating to loading and stability on the Certificate of Inspection apply only to ocean routes.

As stated previously in this decision, the term "Oceans" printed on the face of the Certificate of Inspection refers to the maximum nautical route permitted. Pursuant to 46 C.F.R. 90.05-7, it also authorizes the more restrictive route of inland waters. Consequently, any conditions of operation or restriction appearing on such a Certificate of Inspection directly apply to inland as well as ocean roues.

V

Appellant asserts that he was assured by the vessel owner that the barge CMS-754 was safely loaded and consequently, he should not be held responsible for any resultant mishap caused by improper loading. I find this argument without merit. The master of a vessel is required to know the operating characteristics of his particular vessel. Appeal Decision 2302 (FRAPPIER), Appeal Decision 2272 (PITTS). It is also encumbent on the master or operator of a vessel to make a reasonable effort to discover hazards on his vessel. Appeal Decision 2367 (SPENCER), Appeal Decision 2308 (GRAY), Appeal Decision 2307 (GABOURY). These requirements extend not only to a towing vessel but also to the vessel being towed. See, Collier, supra, Kingfisher Marine Service, Inc., supra, Dillingham Tug & Barge Corp., supra. Where the operator has a reasonable opportunity to become aware of the deficiencies of the vessel, the argument that the operator's employer was contributorily negligent by misleading him is not a viable defense in these proceedings. Appeal Decision 2367 (SPENCER), Appeal Decision 2308 (GRAY), Appeal

Decision 2319 (PAVLEC), Appeal Decision 2367 (SPENCER), Appeal Decision 2400 (WIDMAN), Appeal Decision 2421 (RADER). In this case, the record clearly demonstrates that regardless of the conduct of the owner, Appellant knew or reasonably should have known that the CMS-754 was overloaded to the point of being unseaworthy, and was responsible, based on the following: Appellant was the lead operator in control of the towing flotilla. He gave orders tothe other towing vessel, operating astern of the CMS-754. (Transcript at Pages 56, 96). Appellant personally questioned the adequacy of the cargo arrangements. (Transcript at Pages 196-199). In fact, Appellant was sufficiently concerned to make an appropriate log entry regarding the lack of tie-down cables on the containers. (Respondent Exhibit B), (Transcript at Page 211). Appellant also knew that there were winds in excess of twenty knots forecast, (Transcript at Pages 214-215) and he could readily observe the low freeboard of the barge (Transcript at Pages 48-49) and the significant sail area of the cargo. Finally, Appellant did not take the time to review the CMS 754's Certificate of Inspection or stability documentation, incorporated by reference as a condition of operation on the Certificate of Inspection. The vessel master or operator is required to know the status of the Certificate of Inspection as a prerequisite to any voyage. Appeal Decision 2308 (GRAY). I interpret this requirement to extend to the vessel being towed as well as the towing vessel, in accordance with the responsibilities placed on the towing vessel operator in Collier, supra, King Fisher Marine Service, Inc., supra, and Dillingham Tug & Barge Corp., supra. Consequently, despite all of the information made available to the Appellant, he towed the barge in an unseaworthy condition, of his own volition, and accordingly is responsible for the consequences.

CONCLUSION

The findings of the Administrative Law Judge are supported by substantial evidence of a reliable and probative nature. The hearing was conducted in accordance wth the requirements of applicable regulations.

ORDER

The order of the Administrative Law Judge, dated at Long Beach, California on 16 June 1987 is AFFIRMED.

CLYDE T. LUSK, JR

Vice Admiral, U.S. Coast Guard
Vice Commandant

Signed at Washington, D.C., this 4th day of February, 1988.

2. PLEADINGS

2.10 Cause Of Action

Respondent may be charged with violation of law or regulation in same action as charge of negligence or misconduct, where based on same operative facts due to exigencies of proof.

Charge of violating stability letter and COI valid even if vessel operated on inland waters

10. MASTER OFFICERS SEAMAN

10.20 Master

Master/Tug Operator responsible regardless of conduct of owner where deficiencies reasonably known

Master or operator must make reasonable effort to discover vessel hazards

11. NAVIGATION

11.14 Certificate of Inspection

Term "Oceans" on COI refers to maximum route permitted

Conditions of operation apply to inland as well as ocean routes

Violation of conditions of COI constitutes violation of statute

11.90.1 Stability Letter

Stability restrictions apply to inland as well as

ocean route

Purpose of Stability Letter is to insure safe, prudent loading and underway stability

CITATIONS

Appeal Decisions Cited: 2379 (DRUM), 2346 (WILLIAMS), 2392 (BUSINELLE), 2110 (HARRIS), 2136 (DILLON), 2308 (GRAY), 2302 (FRAPPIER), 2272 (PITTS), 2367 (SPENCER), 2307 (GABOURY), 2319 (PAVLEC), 2421 (RADER).

Federal Cases Cited: Kuhn v. CAB, 183 F.2d 839 (D.C. Cir. 1950), Citizens State Bank of Marshfield MO v. FDIC, 752 F. 2d 209, (8th Cir. 1984); NLRB v. Mackay Radio & Telegraph Co., 304 U.S. 333, 58 S.Ct. 904 (1934), Collier v. 3-A's Towing Co., Inc., 652 F. Supp. 576 (S.D. AL 1987), Kingfisher Marine Service Inc. v. The N.P. SUNBONNET, 724 F.2d 1181 (5th Cir. 1984), Dillingham Tug & Barge Corp. v. Collier Carbon & Chemical Corp., 548 F. Supp 691 (N.D. CA 1981); Tidewater Marine Activities Inc. v. American Towing Co., 437 F. 2d 124 (5th Cir. 1970).

Regulations Cited: 46 CFR 5.701, 46 CFR 5.33, 46 CFR5.5, 46 CFR 5.27, 46 CFR 97.50-1(a), 46 CFR 90.05-7, 46 CFR 93.07, 46 CFR 170.120,.

Statute Cited: 46 USC 7702, 46 USC 2302, 46 USC 3313.

***** END OF DECISION NO. 2478 *****